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No. 99-208

IN THE
Supreme Court of the United States

FRANKLIN SAVINGS CORPORATION AND
FRANKLIN SAVINGS ASSOCIATION,
Petitioners,

v.

UNITED STATES OF AMERICA AND
FEDERAL DEPOSIT INSURANCE CORPORATION,
as successor-in-interest to the
Resolution Trust Corporation,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONERS' REPLY BRIEF

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69

TABLE OF CONTENTS

Page

I. RESPONDENTS' ASSERTION THAT "EVEN IF THE RTC ABUSED ITS DISCRETION IN A WAY THAT LED TO FSA'S LIQUIDATION, THAT WOULD NOT GIVE RISE TO A CAUSE OF ACTION UNDER THE FTCA".. 1

II. RESPONDENTS' ASSERTION THAT THE RTC WAS ACTING IN A REGULATORY CAPACITY WITH RESPECT TO THE CONDUCT GIVING RISE TO PETITIONERS' CLAIMS 3

III. RESPONDENTS' ASSERTION THAT 28 U.S.C. § 1653 IS DISCRETIONARY AND PERMISSIVE 5

TABLE OF AUTHORITIES

Cases

Berkovitz v. United States, 486 U.S. 531, 108 S. Ct. 1945, 100 L. Ed. 2d 531 (1988) 2

United States v. Gaubert, 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991) 2, 3, 4

United States v. Winstar, 518 U.S. 839, 116 S. Ct. 2432, 135 L. Ed. 2d 964 (1996) 3, 4

Statutes and Rule

11 U.S.C. § 106 5

28 U.S.C. § 1653 5

Federal Rule of Civil Procedure 12(b) (6) 2

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PETITIONERS' REPLY BRIEF

Petitioners submit the following Reply to three points raised by Respondents; the balance of Respondents' contentions are dealt with in the Petition.

I. RESPONDENTS' ASSERTION THAT "EVEN IF THE RTC ABUSED ITS DISCRETION IN A WAY THAT LED TO FSA'S LIQUIDATION, THAT WOULD NOT GIVE RISE TO A CAUSE OF ACTION UNDER THE FTCA."

On February 15, 1990, the Director of the OTS ordered that FSA be placed into conservatorship and appointed

the RTC as conservator "not for the purpose of liquidation . . ." (the "Order"). Petitioners allege that immediately after the RTC's appointment and in violation of the mandate of the Order, the RTC began a course of conduct to liquidate FSA.[1]

Notwithstanding the specific policy directive that the RTC was not to liquidate, the government now argues that "even if the RTC abused its discretion in a way that led to FSA's liquidation, that would not give rise to a cause of action under the FTCA." (Resp. Br. at p. 9.) It is this very argument that makes the Tenth Circuit precedent dangerous and points the way to why this Court should grant the Petition.

Simply stated, the government believes, as Petitioners warned in their Petition, that under the Tenth Circuit opinion, an agency has discretion to disobey a specific mandate.

If the lower court decision is permitted to stand, (i) the holding of this Court in *Gaubert* and *Berkovitz* that immunity does not exist for conduct that violates a specific mandate will be rendered infirm, (ii) the discretionary function exception to the FTCA will swallow the entire statute, and (iii) agencies heretofore expected to obey specific mandates can, with the impunity of a despot, disregard the policy considerations underlying the mandate and proceed unfettered.

In its analysis, Respondents nowhere address the key point in this litigation: The Order appointing the RTC as

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[1] Since this is an appeal from an Order of Dismissal under Rule 12(b)(6), Petitioners' allegations that the RTC engaged in a liquidation of the FSA that began immediately upon its appointment as conservator are considered to be true. Those portions of Respondents' brief challenging whether the RTC commenced and carried out a liquidation should be disregarded at this point.

conservator specifically directed that the RTC could not liquidate FSA. Certainly, the Director of the Office of Thrift Supervision had broad power in deciding what supervisory action, if any, would be imposed on FSA. The OTS Director's decision is a perfect example of the exercise of "judgment as to which a range of permissible courses is the wisest." [2] After reviewing the OTS Administrative Record, the Director chose a course of action and issued an official Order documenting that policy choice. He chose conservatorship rather than receivership and specifically ordered that the conservatorship was "not for the purpose of liquidation."

In view of the Order, any "policy choice" by the RTC to engage in conduct that amounts to a liquidation is the act of a despot, not the act of a governmental agency following the law. Liquidation was clearly not within the "range of permissible courses" available to the RTC.

The social interest and policy favoring the rule of law is heavily at stake in this case. The Petition should be granted so that agencies will know that in their dealings with the private sector, the courts will not allow them to run amok, but rather will insist on adherence to the mandates that define and, in this case, restrain their conduct.

II. RESPONDENTS' ASSERTION THAT THE RTC WAS ACTING IN A REGULATORY CAPACITY WITH RESPECT TO THE CONDUCT GIVING RISE TO PETITIONERS' CLAIMS.

In *United States v. Winstar*, 518 U.S. 839, 116 S. Ct. 2432, 135 L. Ed. 2d 964, 1004 n.39 (1996), this Court recognized that the government is not shielded from lia-

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[2] *Gaubert v. United States*, 499 U.S. 315, 325, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991).

bility when it steps down from its governmental functions and enters the domain of commerce as a private citizen. Although *Winstar* arose in a contract setting, the Court did not limit it to contract cases; to the contrary, the broad language in note 39 is highly suggestive of an expansive interpretation. Respondents would like *Winstar* to be narrowly construed so government agencies running private companies can do whatever they desire with impunity, no matter what damage is visited on private commercial entities in the process. However, the policy underlying *Winstar* is to put the government on a level playing field with other private actors when the government enters commerce, not as a regulator, but as a business participant.

Respondents also suggest that since the defendant in *Gaubert* was found to be involved in oversight of financial institutions generally, then the RTC in this case must have been similarly engaged. The logic of Respondents' regulatory capacity argument, however, is flawed. In *Gaubert*, the actions complained of were those of the financial institution's regulator, the Federal Home Loan Bank Board (FHLBB). Furthermore, those actions related to the FHLBB's duty to supervise and regulate that financial institution. The FHLBB retained its supervisory role and did not take over and actually operate the business. In the instant case, FSA's regulator was the OTS. The RTC never assumed or occupied a regulatory position or capacity. Rather, the RTC was carrying on the non-regulatory function of *operating* a savings and loan. The RTC entered commerce and supplanted FSA's board of directors and officers. It occupied the capacity that theretofore had been carried on by private citizens. Such conduct is not, and should not be, shielded by government immunity.

III. RESPONDENTS' ASSERTION THAT 28 U.S.C. § 1653 IS DISCRETIONARY AND PERMISSIVE.

Contrary to Respondents' argument, the language of 28 U.S.C. § 1653 does not give a court discretion to deny an amendment which sets forth a jurisdictional allegation. Section 1653 provides, in pertinent part: "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."

When the statute states that jurisdictional allegations may be amended, the word "may" applies to the party making the amendment, not to the court. Courts do not amend allegations; the parties do. Thus, Petitioners, under the statute, may decide to amend to state jurisdictional allegations.

Section 106 of the Bankruptcy Code is clearly applicable here and provides jurisdiction for Petitioners' state law claims. Petitioners' previous argument to the contrary, noted by Respondents in their brief, was based on the language of Section 106 at the time of the motion, which language was subsequently amended on October 22, 1994 with retroactive effect. The current version of Section 106 applies to this case and supports jurisdiction.

Petitioners respectfully submit that the Petition should be granted.

Respectfully submitted,

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